

A SIMPLE GUIDE TO THE EC MERGER REGULATION OF 2004

by
John J. Parisi



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INTRODUCTION – THE DISTINGUISHING FEATURES OF EU MERGER CONTROL

The Treaty of Rome of 1957, creating the European Economic Community and its institutions – the Council of Ministers, the European Parliament, the Court of Justice, and the European Commission (EC) – included articles condemning anticompetitive agreements among competitors and abuses of a dominant position. Merger control was not specifically mentioned in those articles. The need for merger control at the Community level was recognized in the early 1970s – coincidentally, at about the time that Germany amended its antitrust law to give the *Bundeskartellamt* merger control authority and shortly before the U.S. Congress enacted the Hart-Scott-Rodino Act requiring pre-merger notification – as the EC’s attempts to apply Articles 81 and 82 to mergers illuminated their shortcomings.

The European Commission did not obtain merger control authority, however, until 1989, when – stamped with the “EC-92” label – its enactment was viewed as one of many measures necessary to facilitate the development of a single, integrated – or “common” – European market. EU merger control was intended to provide a “level playing field” in a “one-stop shop” for the examination of mergers with significant cross border effects. Reflecting the reluctance of the Member States to cede such authority to the Commission and skepticism of the Commission’s ability to act in a timely manner, the Council of Ministers, in enacting the Merger Regulation, placed jurisdictional and procedural restrictions on the Commission’s authority. The former limits the scope of the EC’s merger control authority vis-à-vis the Member States and the latter subjects the Commission to certain, non-waivable decision deadlines. Amendments to the Merger Regulation, adopted in 2003 and effective since May 1, 2004, make evolutionary changes that preserve these distinctive elements of EU merger control. The Commission, coincidentally, also adopted consequential administrative and organizational changes. This paper reflects the state of the Regulation and implementing and interpretive instruments as of November 1, 2005.

The EC Merger Regulation reflects legal structures and policy decisions that differ in important respects from those with which most American practitioners are familiar under U.S. law. Some of those differences – especially the division of jurisdiction between the Commission and the member States and the procedural deadlines – have practical consequences which can be magnified when a merger is also subject to review by U.S. and other authorities. Differences between the procedure under the EC Merger Regulation and the U.S. process under the Hart-Scott-Rodino Act (HSR) are noted at relevant points throughout this Guide.


This Simple Guide is intended, therefore, to provide an overview of the essential jurisdictional, procedural, and substantive elements of the EU Merger Regulation, highlighting changes made by the 2004 amendments as well as differences with U.S. law and practice. It is the author’s hope that this Guide will foster understanding of the EU Merger Regulation that will be useful to practitioners, especially when representing parties engaged in merger transactions subject to review both by U.S. and European authorities. Throughout this Guide,  indicates what is new or revised in 2004.


¹ The author is Counsel for European Affairs, International Antitrust Division, U.S. Federal Trade Commission. The views expressed herein are his own and do not necessarily reflect the views of the FTC or any Commissioner thereof.


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I. THE EC MERGER REGULATION AND RELATED LEGAL INSTRUMENTS

This section provides references and sources to the EC Merger Regulation of 2004, effective May 1, 2004, and the various regulations, notices, and guidelines under which it is implemented.


 **1. THE MERGER REGULATION:** Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24, 29 Jan. 2004, (hereafter “Merger Regulation” or “ECMR”): http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf.

 **2. The IMPLEMENTING REGULATION:** Commission Regulation (EC) No 802/2004 implementing the Merger Regulation [on the notifications, time limits and hearings provided for therein]: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_133/l_13320040430en00010039.pdf.


Also available at this site (appended to the Implementing Regulation) are: revised Form CO, Short [simplified] Form CO, and  Form RS.

3. Commission Interpretive notices on: the concept of *concentration*; the concept of *undertakings concerned*; the *calculation of turnover*; the concept of *full-function joint ventures*:

<http://europa.eu.int/comm/competition/mergers/legislation/mergin98.html>

 *Restrictions directly related and necessary to concentrations* (a/k/a *ancillary restraints*):

http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_056/c_05620050305en00240031.pdf; and

 *The case referral system* under Articles 4, 9, and 22 of the Merger Regulation:

http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_056/c_05620050305en00020023.pdf.

4. Commission notice on **ACCESS TO THE FILE**:²

http://europa.eu.int/comm/competition/antitrust/acdosen_en.html.

 **5. Commission notice** on **SIMPLIFIED PROCEDURE** for certain concentrations:

http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_056/c_05620050305en00320035.pdf.

6. Commission substantive notices:

a. on the definition of the **RELEVANT MARKET**:

http://europa.eu.int/comm/competition/antitrust/relevma_en.html.

 b. Guidelines on the Assessment of **HORIZONTAL MERGERS**: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf.

c. on acceptable **REMEDIES**, *available at*: http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf.

7. Commission Best Practice notices:

a. on the **Conduct of EC Merger Control Proceedings**, *available at*:

http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf.

b. on **Divestiture Commitments**, *available at*:

http://europa.eu.int/comm/competition/mergers/legislation/explanatory_note.pdf.

²

On 21 Oct. 2004, the EC invited comments on a proposed revision of its Notice on Access to the File at: http://europa.eu.int/comm/competition/general_info/access_to_documents.html. Comments were due by 2 Dec. 2004.

II. JURISDICTION – WHAT TRANSACTIONS ARE COVERED AND WHO EXAMINES THEM?

Merger control authority in Europe is divided between the EC and the EU Member States. This section identifies what transactions covered by the ECMR and what can happen to those that are not.

A. Jurisdictional triggers – the scope of the Commission’s authority:

A “concentration” of a “community dimension” falls within the EC’s exclusive jurisdiction; EU Member States may not apply their merger regimes to such transactions, ECMR, Art. 21(3.), except where the Commission refers such a transaction to Member State authorities under ECMR Art. 9.³

1. What is a “Concentration” with a “Community dimension”?

a. A “**concentration**” arises under ECMR Art. 3 where a change of control on a lasting basis results from:

(i) the merger of two or more previously independent undertakings, or

(ii) the acquisition of one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.⁴

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, also shall constitute a concentration.

b. “**Community dimension**” is delineated in ECMR Art. 1 by world-wide and EU-wide turnover of the undertakings concerned. Concentrations are of a “Community dimension” either where the merging parties’ (the “undertakings concerned”):

(i) combined world-wide turnover is > €5 billion and each of at least two of the merging parties realized > €250 million turnover in the EU, unless each of the merging parties obtains more than 2/3 of its EU turnover in one and the same Member State,⁵ or

(ii) combined world-wide turnover is > €2.5 billion; in each of at least three Member States, the combined turnover of the merging parties is > €100 million; in each of those three Member States, the turnover of each of at least two of the merging parties is > €25 million; the Community wide turnover of each of at least two of the merging

³ The thresholds delineating the EC’s jurisdiction and triggering the notification obligation are the same; by contrast, in the U.S., the Clayton Act, § 7, covers mergers that are not reportable under the Hart-Scott-Rodino Act (H-S-R). The EC has exclusive jurisdiction over concentrations of a “Community dimension;” by contrast, U.S. states have concurrent jurisdiction with the U.S. federal agencies.

⁴ The definition of “control” in ECMR Art 3(2.) is not 50 percent, as under the U.S. HSR rules, but rather “the possibility of exercising decisive influence.”

⁵ The EU jurisdictional thresholds are based solely on the size and location of an undertaking’s turnover; unlike under HSR, there is no consideration of size or location of assets.

parties if > €100 million; unless each of the merging parties obtains more than 2/3 of its EU turnover in one and the same Member State.⁶

2. When Member States may review Concentrations of a Community Dimension

ECMR Art. 9 permits the EC to refer such a concentration to a requesting Member State where it:

- threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market; or
- affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

Article 9 is a subsidiarity safety valve, but a “partial” referral fragments review of the proposed concentration and potentially can result in conflicting decisions.⁷

B. What if the transaction is not a “concentration”?

Art. 81 of the EC Treaty may apply, but that does not preclude Member State merger reviews; see, for example, *Covisint*, a “B2B” venture that the EC reviewed under Art. 81 and Germany’s *Bundeskartellamt* reviewed as a merger under its competition law.⁸

C. What if the transaction is a concentration, but not of a Community dimension?

- EU Member State merger control regimes may apply. Of the 25 EU Member States, only Luxembourg does not have a merger control regime.
- The Member State(s) may, under ECMR Art. 22, refer to the EC a concentration that is not of a Community dimension but that affects trade between Member States and threatens to significantly affect competition within the referring Member State(s).⁹
- Where such a concentration “is capable of being reviewed under the competition laws of at least three Member States,” ECMR Art. 4(5.) provides a process whereby the EC may request referral of the merger. If no Member State objects to the request, the merger shall be deemed to be of a Community dimension and shall be notified to the EC.

⁶ Few cases have fallen within this threshold. See, e.g., *UPM-Kymmene/Morgan Adhesives*, Case No COMP/M.2867, Comm. Dec. of 16 Oct. 2002, ¶ 8: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2867_en.pdf.

⁷ See, e.g., *SEB/Moulinex*, Case no COMP/M.2621 of 8 Jan. 2002. The EC referred this matter, insofar as it affected markets in France, to the French authorities. The EC investigated effects elsewhere in the EU and reached a settlement requiring remedies in nine Member States, but not in five others. Third parties challenged, *inter alia*, the EC’s referral decision. The CFI upheld the referral but noted the potential for conflicting decisions in such “partial” referral cases. See *Philips v. Comm.*, Case T-119/02, Judgment of the Court of First Instance, ¶¶ 311-358, 3 Apr. 2003: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62002A0119.

⁸ See *Covisint*, EC press release IP/01/1155 of 31 July 2001; and *Bundeskartellamt* press release of 26 Sept. 2000, at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2000/2000_09_26.shtml.

⁹ See, e.g., *Promatech/Sulzer Textil*, Case no COMP/M.2698, Commission decision of 24 July 2002: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2698_en.pdf.

III. THE PROCEDURE OF A EUROPEAN COMMISSION INVESTIGATION

This section provides: an overview of the timetable and procedure for merger investigations, highlighting **Best Practices on the Conduct of EC Merger Control Proceedings** and the **Implementing Regulation**; an overview of the EC's investigative tools and penalties for non-compliance; and, it highlights some differences between EC and U.S. practice.

A. Timetable for Merger Review

Note: All references to “**days**” in the Procedure mean “**working days**,” as defined in Art. 24 of the Implementing Regulation.

1. Pre-notification Consultations

Informal, confidential consultations between the parties to a proposed concentration and DG COMP are recommended by the EC, and have been endorsed by the Court of First Instance (CFI).

Among the issues dealt with in such consultations are:

- whether the EC has jurisdiction over the proposed concentration;
- whether the matter could be referred to Member State(s) under ECMR Art. 9 or from Member State(s) under ECMR Art. 22;
- whether the matter qualifies for the Simplified Procedure;
- what information the parties must submit in and with premerger Form CO;¹⁰
- identifying key issues and possible competition concerns;
- raising possible efficiency claims;
- potential interagency cooperation with foreign competition authorities
- ascertaining deadlines.

These consultations can take some time, but are useful, *inter alia*, to avoid a “bounced” notification and to properly focus the investigation once the deal is notified. Refer to **Best Practices, section 3**, concerning the purposes and timing of pre-notification consultations, as well as information to be provided in that process, and the possibility of contacting third parties prior to notification.

¹⁰ There is no provision for a “second request” in the ECMR; thus, Form CO is far more demanding than the U.S. HSR premerger notification form. The EC considered the U.S. two-step approach, but rejected it. According to the Commission’s XXth Report on Competition Policy (1990), at 36,

a single notification form comprising from the outset all the information requested was preferred to a ‘two-stage approach’. The aim is to enable the Commission, from the first stage of the procedure, to assess whether a merger involves serious doubts as to its compatibility with the common market and thus to ensure that decisions to initiate proceedings are not taken merely in order to allow a more detailed examination, due to a lack of information. This would have run counter to the rapid procedures provided for in [the ECMR].

2. Phase I

The first stage of the procedure commences with Notification – *i.e.*, submission of Form CO¹¹ – and “starts the clock” on the 25-day period for the EC to issue its Phase I decision.

Practice notes:

a. Under ECMR Art. 4(2.), parties merging or acquiring joint control file Form CO jointly; otherwise, only the acquiring party is required to file Form CO.

b. The EC publishes in the Official Journal the fact that notification has been received,¹² and distributes copies of Form CO to all of the Member State competition authorities.¹³

c. Notification may be based upon a letter of intent to merge or acquire (as allowed under U.S. rules) “where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, . . .” ECMR Art. 4(1.). The previous 7-day deadline for notification was repealed.

- Within **3 days** after notification, the EC must transmit the copies of Form CO provided by the parties to the Member States’ competition authorities, ECMR, Art. 19(1.), and it must publish the fact of notification in the Official Journal, per ECMR Art. 4(3.).
- Within **15 days** after notification, the EC will offer a “**State of Play**” meeting where it appears that the concentration raises “serious doubts”. *See Best Practices, §5.1*, regarding aim and format of State of Play meetings.
- Within **15 days** after receipt of the notification from the EC, Member States must inform the EC if they wish to request **referral** of the case under ECMR, Art. 9(2.). Where referral is requested, the deadline for the Phase I decision is extended by 10 days, to 35 days.
- Within **20 days** after notification, the parties must submit **proposed undertakings** if they hope to achieve a settlement in **first stage**; Implementing Reg, Art. 19(1.). If so offered, the deadline for a Phase I decision is extended by 10 working days (to 35), after which the merger is either cleared, subject to the proposed undertakings, or where the undertakings prove deficient, “second-stage” proceedings are initiated, ECMR, Art. 6(1.)(c).
- Within **25 days** after notification (ECMR Art. 10(1.)), DG COMP:
 - determines whether the merger meets the jurisdictional thresholds;

¹¹ Form CO is appended to the Implementing Regulation. There is no filing fee for filing Form CO.

¹² By contrast, in the U.S., even the mere fact of filing the HSR must be kept confidential.

¹³ By contrast, the U.S. federal agencies are not obliged to share HSR information with state authorities.

- confers with other interested Commission Directorates (*e.g.*, the Telecommunications Directorate in cases involving the telecoms industry) and the Legal Service;
 - seeks and considers submissions by interested third parties;
 - decides whether the proposed concentration “raises serious doubts as to its compatibility with the common market;” *i.e.*, may be anticompetitive.
- Unless undertakings are offered, **within 25 days** after notification, the EC must issue its Phase I decision (ECMR Art. 6(1.)). If the proposed concentration does not raise serious doubts, the EC must clear it.¹⁴ The EC issues a written decision in all but the most non-problematic cases.¹⁵
 - If undertakings are offered, or a Member State seeks referral, the Phase I decision is issued **within 35 days** after notification.

3. Phase II

Second-stage proceedings consist of the following steps that must be concluded **within 90 days**. This timetable is subject to extension by the parties or the EC “stopping the clock” or the parties offering remedial commitments after the 54th day of the proceedings.¹⁶

- The EC initiates the **Proceedings** (“IP”) by issuing to the parties a formal, written decision, describing the Commission’s “serious doubts.”¹⁷ The decision is confidential, and the EC does not prepare and issue a public version.
- Within **10 days after IP**, DG COMP will hold a “**State of Play**” meeting with the parties “to facilitate the notifying parties’ understanding of DG COMP’s concerns at an early stage of the Phase II proceedings.” (Best Practices, 33(b))
- “**Stop the Clock**” possibilities (ECMR Art. 10(3.), 2nd subparagraph):
 - Within **15 days after IP**, the parties may request an extension of time; or

¹⁴ ECMR, Art. 6(1.)(b). Under a *habilitation* adopted by the Commission (akin to what Americans call a delegation of authority), the Competition Commissioner may take this decision by himself.

¹⁵ In 2000, the EC issued notice - updated in 2004 - of a “simplified procedure in unproblematic cases,” identifying three categories of cases that would qualify for a “short-form” decision, noted, *supra*, p. 3, no. 5.

¹⁶ The time limits for decisions in Art. 10 of the ECMR are strict and can be tolled only for a delimited period with the consent of the parties. By contrast, the final decision deadline in H-S-R may be tolled with the consent of the merging parties without limit. The EC must issue decisions in all cases. If it fails to issue a decision by the relevant ECMR deadline, the concentration — under Art. 10(6.) of the ECMR — is deemed cleared in the form originally notified.

¹⁷ ECMR, Art. 6(1.)(c). The EC has opened Proceedings in 5 percent of the concentrations notified since the ECMR took effect in September 1990 through September 2005. Another 4 percent of the concentrations reviewed have been cleared subject to undertakings adopted in first phase. “Serious doubt” is interpreted to mean a “reasonable possibility of a negative decision” on the concentration. Under a *habilitation*, mentioned *supra*, note 14, the Competition Commissioner decides to open proceedings with the Commission President’s concurrence.

- Anytime after IP, the EC may extend time with the parties' agreement, but the total duration of such extensions cannot exceed 20 days.



- “**Triangular**” meetings of parties, 3rd parties, and EC staff are suggested by the Best Practices, §5.3, to be held as early as possible in the investigation “in order to enable DG COMP to reach a more informed conclusion as to the relevant market characteristics and to clarify issues of substance before deciding on the issuing of a Statement of Objections.”
- In approximately six weeks after IP, DG COMP may conclude its investigation with the issuance of a **Statement of Objections** (“S/O,” akin to an FTC complaint) that describes all the EC’s competitive concerns about the proposed concentration. Anything on which DG COMP wishes to rely in its final decision must be included in the S/O. The S/O is accompanied by an invitation to the parties to reply in writing within a date set by DG COMP, often within two weeks. There is no deadline or best practice on timing of the S/O’s issuance. When issuance slips, it compresses the remaining process timetable.
 - S/O issuance triggers the parties’ right of “**access to the file**,” DG COMP’s investigative file, including third party submissions redacted to eliminate “business secrets.”¹⁸
- Approximately two weeks after issuance of the S/O, if the parties’ request it, DG COMP conducts a formal **hearing** at which unsworn testimony is taken from the parties and other interested parties including customers and competitors. It is not a trial in the American sense, as testimony is not sworn, nor is there cross-examination of the kind that is conducted in a U.S. judicial procedure.¹⁹
- Following the parties’ reply to the S/O and the hearing, another “State of Play” meeting may take place that “may also serve as an opportunity to discuss the scope and timing of possible remedy proposals.” Best Practices, 33(d)
- Within **65 days after IP** (i.e., shortly after the hearing and about one month prior to the deadline for a final Commission decision), the parties must submit any proposed **undertakings** that they wish the EC to consider to settle the case. Implementing Reg., Art. 19(2.)
- If the parties submit proposed remedies between 55 and 65 working days after IP, the deadline for the EC’s final decision is extended by 15 days. ECMR, Art. 10(3.)
- Another “State of Play” meeting may take place prior to the Advisory Committee meeting, primarily to discuss proposed remedies.

¹⁸ Commission Notice on Access to the File: http://europa.eu.int/comm/competition/antitrust/acdosen_en.html. Similar access is not afforded in the U.S. unless and until the agencies issue a complaint and the matter goes to litigation.

¹⁹ Information about Hearings, including the role of the Hearing Officer is available at: http://europa.eu.int/comm/competition/hearings/officers/index_new.html.

- An **Advisory Committee**, made up of representatives of the 15 EU Member State competition authorities, reviews DG COMP's proposed decision and issues an advisory opinion thereon. ECMR Art. 19(3.-7.)
- **Commission decision:** As a practical matter, the Commission aims to adopt its decision at its regular Wednesday meeting two weeks prior to the statutory decision deadline.

All decisions on concentrations following second stage proceedings must be taken by the full college of Commissioners. All decisions on concentrations - whether taken after first or second stage - are subject to review by the European Court of Justice.²⁰

B. The EC's investigative tools

ECMR Art. 11-13 describe the EC's investigative powers, including compulsory process to obtain answers to written questions and on-site inspection of books and records. The EC is not empowered, as are U.S. agencies, to compel oral testimony under oath, but it may take voluntary interviews. Its powers to inspect undertakings' premises include the ability to seal business premises and books and records.

C. Penalties for infringements: costs in both delay and euros

1. Suspension of deadlines

ECMR Art. 10(4.) allows the EC to suspend the decision deadlines, where parties do not timely comply with information requests or on-site inspections. Art. 9 of the Implementing Regulation provides more detail as to application of this power. The EC stopped the clock in its investigation of the *Schneider/Legrand* case in 2002, an action that was upheld by the CFI.²¹

2. Fines

ECMR Art. 14(1.) provides for the imposition of fines of up to 1% of the aggregate turnover of the undertakings concerned where they, *inter alia*, intentionally or negligently: supply incorrect or misleading information on Form CO or other submissions; supply incorrect or misleading information in response to an Art. 11 request or decision or fail to respond within the time specified; or, refuse to submit to or fail to produce required records in an investigation. Under ECMR Art. 15(1.), the EC may also impose periodic penalty payments of up to 5% of the average daily aggregate turnover of the undertaking(s) concerned per day for delays in providing complete and correct information in response to an Art. 11 request or for refusal to permit an on-site investigation.

ECMR Art. 14(2.) provides for the imposition of fines of up to 10 percent of the aggregate turnover of the undertaking(s) concerned where they, *inter alia*, fail to notify a concentration prior to its implementation; fail to comply with conditions of a Commission decision clearing a merger; or, consummate a merger in the face of a prohibition decision.

²⁰ ECMR, Arts. 21(1.) and 16. See Sec. VI. of this paper on Judicial Review.

²¹ *Schneider Electric SA v. Commission*, Case no T-310/01, Judgment of the Court of First Instance (First Chamber), 22 Oct. 2002, ¶¶ 74-113; available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001A0310.

IV. SUBSTANTIVE ANALYSIS BY THE EUROPEAN COMMISSION AND THE COURTS

The substantive analysis of an EC merger case begins with definition of “affected” markets, that is the relevant product and geographic markets. It proceeds to an assessment of the possible competitive effects in the affected markets as well as countervailing factors, and, with the cooperation of the parties, determines whether agreement can be reached within the decision deadlines on undertakings that would remedy anticompetitive effects.

The substantive test was revised by the Council in the new Merger Regulation of 2004. Consistent with that revision, the Commission issued horizontal merger guidelines, describing its analysis. This section describes the analytical process, noting the sources of guidance used by the Commission.

A. Substantive Standard in the Merger Regulation

Article 2(2.) & (3.) of the Merger Regulation states the test of a merger’s “compatibility with the common market” to be whether it would significantly impede effective competition in the common market or in a substantial part of it in particular as a result of the creation or strengthening of a dominant position. . . ²²

Recital 25, in the Regulation’s preamble, ²³ clarifies the scope of the revised test, stating that

[t]he notion of ‘significant impediment to effective competition’ in Article 2(2.) and (3.) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

B. Statutory Factors that the Commission must consider

Article 2(1.) of the Merger Regulation requires the Commission to take into account the following factors when appraising a merger:

- (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the Community;
- (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.

The factors underlined deserve some explanation. The first – economic and financial power – may appear to be a “deep pockets” factor, that causes the Commission to take into account the financial wherewithall of the merged entity. This is not a factor that, by comparison, is given much weight by U.S. antitrust

²² Under the previous standard, the Commission would first determine whether the merger created or strengthened a dominant position before determining whether the merger would significantly impede effective competition. The new standard preserves the creation or strengthening of dominance as a particular way in which effective competition may be impeded by a proposed merger and, thus, preserves prior case law on that issue.

²³ Recitals are expressions of legislative intent that the Council includes as a preamble to its Regulations.

agencies. But, in *RJB Mining plc v. Commission*,²⁴ the CFI annulled the Commission's decision in the merger case in part for its failure to take this factor into account. The second – technical and economic progress – is language found in EC Treaty Art. 81(3) and is deemed the legal basis on which the Commission may consider efficiency claims; it will be described further, below, in III.F.4. The point to remember here is that these are statutorily-mandated factors that the EC must consider in appraising concentrations.

C. Market Definition

The EC defines product and geographic markets pursuant to guidelines it issued in 1997. They were immediately seen as a step toward analytical convergence with the U.S. agencies²⁵ as compared with the market definition provisions of their 1992 Horizontal Merger Guidelines.²⁶

Geographic market definition in some cases has reflected the fact that a “single” EU-wide market does not yet exist in some products. For example, in *Volvo/Scania*,²⁷ Sweden's stringent truck roll-over test contributed to a finding that Sweden was a separate geographic market for heavy trucks. The *Pirelli/BICC*²⁸ case reflected the evolution of the market for electrical power transmission cables into an EU-wide market from the days of the early 90s when the EC found those markets to be national in scope in its decision in *AEG Kabel/Alcatel*.²⁹

D. Safe Harbors?

The Merger Regulation, since its first enactment in 1989, has contained a recital (no. 32 in the 2004 Regulation) stating that “[c]oncentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market, . . . in particular, where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it.” The Commission points out in footnote 24 of its Horizontal Merger Guidelines that “such an indication does not apply to cases where the proposed merger creates or strengthens a collective dominant position involving the “undertakings concerned” and other third parties [citations omitted].”

²⁴ CFI decision of 31 Jan. 2001, *available at*: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61998A0156.

²⁵ *See, e.g.*, Simon Baker and Lawrence Wu, “Applying the Market Definition Guidelines of the European Commission,” [1998] E.C.L.R. 273.

²⁶ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992) (with April 8, 1997 revision to § 4), *available at*: <http://www.ftc.gov/bc/docs/horizmer.htm>.

²⁷ *Volvo/Scania*, Case No COMP/M.1672, Commission Decision of 15 March 2000, http://europa.eu.int/comm/competition/mergers/cases/decisions/m1672_en.pdf.

²⁸ *Pirelli/BICC*, Case No COMP/M.1882, Commission decision of 19 July 2000, http://europa.eu.int/comm/competition/mergers/cases/decisions/m1882_en.pdf.

²⁹ *Alcatel/AEG Kabel*, Case No IV/M.165, Commission Decision of 18 Dec. 1991, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m165_en.pdf. Germany unsuccessfully sought an Art. 9 referral of the case to the *Bundeskartellamt*, believing that the markets were indeed national; that Alcatel's acquisition would affect a distinct market in Germany; and, that it would establish collective dominance in that market.

The Horizontal Merger Guidelines, ¶¶ 19 and 20, provide Herfindahl-Hirschmann Index (HHI) measures that “may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns.” (Guidelines, ¶ 21)

E. Theories of competitive harm

Once the markets have been defined, the Commission must determine whether the merger would significantly impede effective competition. Commission decisions have identified several theories of competitive harm, the first three of which are described in detail in the Commission’s Horizontal Merger Guidelines.

1. Non-Coordinated (a/k/a “unilateral”) effects

The EC’s Horizontal Merger Guidelines, ¶¶ 24-25, describe two general circumstances in which a merger may lead to unilateral anticompetitive effects: where a merger creates or strengthens a dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger, or a merger in an oligopolistic market involving the elimination of important competitive constraints that the merging parties previously exerted upon each other with a reduction of competitive pressure on the remaining competitors. The Guidelines describe a number of factors which may influence whether significant non-coordinated effects are likely to result from a merger.

2. Coordinated effects

When a merger occurs in a market tending toward an oligopoly - that is, a market of few, roughly equal participants rather than a single, dominant player - judgments of the ECJ and CFI have confirmed that the Merger Regulation does cover such circumstances, so long as the Commission can show certain circumstances. These circumstances are similar to those specified in the U.S. Horizontal Merger Guidelines, at § 2.11, concerning the prospect that a merger would facilitate collusion in an oligopolistic market:

- First, there must be sufficient market transparency for each members of the dominant oligopoly to be aware of the others’ market conduct.
- Second, the ‘common policy’ (tacit coordination) must be sustainable over time - meaning there must be adequate deterrents (*i.e.*, retaliation against cheating) to ensure that there is a long-term incentive to maintain the policy.
- Third, it must be established that the foreseeable reaction of competitors and consumers would not jeopardize the results of the common policy.³⁰

3. Elimination of a Potential Competitor

A theory of harm not included in the U.S. Horizontal Merger Guidelines, the EC Guidelines describe specific conditions in § 60 which must be fulfilled for the Commission to conclude that a proposed merger would eliminate a potential competition and therefore be prohibited.

³⁰ EC Horizontal Merger Guidelines, §§ 44-55; *Airtours plc v. Commission*, Case T-342/99, Judgment of the Court of First Instance (Fifth Chamber, Extended Composition), 6 June 2002, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61999A0342.

4. Vertical foreclosure

As noted above, the statutory factors the Commission is required to consider include vertical relationships. The Commission explained its focus in this area as follows:

[V]ertical integration mergers can lead to dependency of competitors for their supplies on the vertically integrated firm with the risk that access to supplies is foreclosed or rendered more difficult or more expensive, thereby raising rivals' costs. This could lead to the weakening or exclusion of competitors and therefore to the creation of a dominant position in the downstream market [citing several cases in which this theory was examined].³¹

The Commission found such effects in a series of mergers in the media industry in the mid- to late-1990s, for example, *MSG Media Service*, in which the Commission found that this merger of programming rights, technology, and administrative services would establish the merged firm as a “gatekeeper” and foreclose competition.³²

5. Conglomerate effects

The CFI's decision in the *Tetra Laval/Sidel* case defines “conglomerate” mergers and declares that they may have anticompetitive effects in certain cases. The CFI said that a conglomerate merger is

a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers or customers. Mergers of this type do not give rise to true horizontal overlaps between the activities of the parties to the merger or to a vertical relationship between the parties in the strict sense of the term. Thus it cannot be presumed as a general rule that such mergers produce anti-competitive effects. However, they may have anti-competitive effects in certain cases.³³

The anticompetitive effects found by the Commission include the creation of portfolio power,³⁴ (that is, the acquisition of a full-range of products that would lead to foreclosure of other suppliers at the distribution level), bundling or tying,³⁵ and leveraging dominance existing in one market to another adjacent market.³⁶

³¹ European Commission, XXIst Report on Competition Policy 1991, 368-369.

³² Case No IV/M.469, Commission decision of 9 Nov. 1994, *available at*: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=31994D0922&lg=EN.

³³ *Tetra Laval BV v. Commission*, Case T-5/02, Judgment of the Court of First Instance (First Chamber), 25 Oct. 2002, ¶ 142, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62002A0005.

³⁴ *Guinness/GrandMetropolitan*, Case No IV/M.938, Commission Decision of 15 October 1997, *available at*: http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_288/l_28819981027en00240054.pdf. The CFI endorsed this theory in its decisions concerning third party challenges to the Commission's decision in *SEB/Moulinex*, *supra*, note 7; *see BaByliss v. Commission*, Case No. T-114/02, Judgment of the Court of First Instance, 3 Apr. 2003.

³⁵ *GE/Honeywell*, Case No COMP/M.2220, European Commission Decision http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf.

³⁶ *Tetra Laval/Sidel*, *supra*, note 33.

F. Countervailing factors

1. Entry

As noted above in IV.B., entry is one of the statutorily-mandated factors that the Commission is obliged to take into account in reviewing a merger. Its Horizontal Merger Guidelines contain a chapter on entry that recites the same three critical factors that are considered by the U.S. antitrust agencies under their 1992 Horizontal Merger Guidelines - namely, whether entry will be likely, timely, and sufficient to prevent the potential anticompetitive effects of a merger.³⁷

2. Buyer Power

The ability of customers to counter the increase in market power that a proposed merger may create has been a determining factor in several EC merger decisions in the past. These cases are cited in support of the EC's description of the buyer power factor in its Horizontal Merger Guidelines.³⁸

3. Failing Firm

Similar to the "Failing Firm" defense as recognized by U.S. courts since the U.S. Supreme Court's decision in the *General Dynamics* case of 1974³⁹ and in the DOJ/FTC Horizontal Merger Guidelines, the European Commission has been willing to clear "rescue mergers." The EC's Horizontal Merger guidelines recognize the Failing Firm defense and describe it in terms quite similar to those of the U.S. guidelines.⁴⁰

4. Efficiencies

Evolution of the EC's treatment of efficiencies echoes that of the U.S. antitrust agencies. The agencies and the courts rejected them as a positive factor in the examination of mergers until the 1997 revision of the DOJ-FTC Horizontal Merger Guidelines that was intended to "invite" parties to offer efficiency claims. The EC's 1991 *deHavilland* decision rejected efficiency claims offered by the parties and specifically left open the issue of "whether such considerations are relevant for the assessment under Article of the Merger Regulation."⁴¹

The EC's views on efficiencies evolved to the point where it proposed, and the Council adopted, a provision embodied in Recital 29 of the Merger Regulation, clarifying the Commission's authority to take efficiencies into account in merger cases. The EC's Horizontal Merger guidelines describe its approach to efficiency claims.⁴²

³⁷ Compare EC Horizontal Merger Guidelines, ¶¶ 68-75, with DOJ-FTC Horizontal Merger Guidelines of 1992 at § 3.

³⁸ EC Horizontal Merger Guidelines, ¶¶ 64-67.

³⁹ *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

⁴⁰ Compare EC Horizontal Merger Guidelines, ¶¶ 89-91, with DOJ-FTC Horizontal Merger Guidelines of 1992 at § 5.

⁴¹ *ATR/DeHavilland*, Case No IV/M.53, Comm. Dec. of 2. Oct. 1991, ¶ 65, http://europa.eu.int/comm/competition/mergers/cases/decisions/m53_en.pdf.

⁴² EC Horizontal Merger Guidelines, ¶¶ 76-88. See also Mario Monti, "Roadmap for the reform project," 4 Jun. 2002; available at:

V. REMEDIES

A. Authority and Procedure:

Article 8(2.) of the Merger Regulation authorizes the Commission to accept undertakings from the parties that modify their proposed concentration to make it compatible with the common market. Such remedies may be offered in First Phase within 20 working days after notification. This extends the First Phase decision deadline from 25 to 35 working days. If remedies are to be offered in Second Phase, they must be submitted no later than 65 working days after the initiation of Second Phase proceedings. If offered 55 working days after the initiation of Second Phase proceedings, the final decision deadline is extended from 90 to 105 working days.⁴³

B. Substance:

The EC published its Notice on Remedies in early 2001. It reflected not only the Commission's experience in working with merging parties to craft effective remedies up to that point, but also the findings of the U.S. Federal Trade Commission's (FTC) "Divestiture Study," issued in 1999,⁴⁴ as acknowledged by then-EC Competition Commissioner Mario Monti.⁴⁵

The Notice begins with General Principles, one of which - stated in ¶ 9 - is the preference for structural, rather than conduct, remedies. The European Court of Justice (ECJ) ruled, however, in a 2005 judgment, that "the categorization of a proposed commitment as behavioural or structural is immaterial and the possibility cannot automatically be ruled out that commitments which are *prima facie* behavioural [examples deleted] may also be capable of preventing the emergence or strengthening of a dominant position;" accordingly, the Commission is obliged to take account of such proposed commitments in their merger decisions.⁴⁶ It goes on to detail the types of remedies acceptable (including elements such as "up-front buyers" and "crown jewels") and preferred implementation terms.

On May 2, 2003, the EC provided further guidance to merging parties in the form of Best Practice Guidelines for Settlement Commitments,⁴⁷ consisting of a standard model for divestiture commitments and a standard model for trustee mandates, as well as explanatory notes.

http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/02/252/0/AGED&lg=EN&type=PDF, and Götz Drauz, "An efficiency defence for mergers: Putting an intricate puzzle together," *Zeitschrift für Wettbewerbsrecht* (Journal of Competition Law) September 2003, at 254.

⁴³ Merger Regulation, Art. 10(1.) (2nd ¶); Implementing Regulation, Art. 19.

⁴⁴ Federal Trade Comm., "A Study of the Commission's Divestiture Process" (1999), <http://www.ftc.gov/os/1999/08/divestiture.pdf>.

⁴⁵ Mario Monti, The Commission Notice on Merger Remedies - one year after, 18 Jan. 2002, http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/10/0/RAPID&lg=EN.

⁴⁶ *Commission v. Tetra Laval BV*, Case C-12/03, Judgment of the European Court of Justice (Grand Chamber), 15 Feb. 2005, ¶¶ 71-89, available at: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0012:EN:HTML>.

⁴⁷ The Best Practices, consisting of Model Forms and explanatory notes, are available at: http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/.

On October 21, 2005, the EC issued a Mergers Remedies Study⁴⁸ of remedies imposed in 40 cases decided from 1996 to 2000. Its results will be used in an upcoming review of the Remedies Notice and related instruments (Model Divestiture Commitments and Trustee Mandate).

VI. JUDICIAL REVIEW

EC decisions are subject to judicial review by the European Court of Justice (ECJ), initiated in its Court of First Instance (CFI). The courts have issued several decisions interpreting the scope of the ECMR and the appropriateness of the EC's enforcement. For example, the courts upheld the EC's interpretation of the ECMR to cover cases of collective dominance in the *Kali und Salz*⁴⁹ and *Gencor* cases.⁵⁰ The CFI has also annulled EC decisions, as it did in the *Airtours*, *Schneider*, and *Tetra Laval/Sidel* cases decided in 2002, finding that the Commission had made "manifest errors of assessment;" in other words, the EC did not produce sufficient supporting evidence for its decisions. The *Airtours* decision also unleashed a debate over whether there was a "gap" in the coverage of the ECMR. The Council's adoption of a new substantive standard resolved that question. Meanwhile, in 2005, the ECJ decided the EC's appeal of the CFI's *Tetra Laval/Sidel* judgment, concerning the standard of review the CFI applied in that case.

Here are some features that distinguish EU judicial review:

A. Standing

Commission decisions may be challenged by appeal to the European Court of Justice's Court of First Instance (CFI) under Article 230 (formerly Art. 173) of the EC Treaty, by

"[a]ny natural or legal person. . . against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former."

The Merging Parties, employees of the merging firms, competitors, and Member State governments are among those who are recognized as having standing to challenge a Commission merger decision. For example, in *RJB Mining plc v. Commission*,⁵¹ the CFI, citing a string of precedents, ruled that the plaintiff (a competitor) had standing, stating (in ¶59),

"an undertaking is concerned by a Commission decision [and therefore may institute judicial proceedings for its annulment] that allows benefits to be granted to one or more undertakings which are in competition with it."

Standing to challenge an EC merger decision is, thus, broader than in the United States where "[a] competitor in the merging industry ordinarily lacks antitrust standing."⁵²

⁴⁸ EC press release, with link to the study, is available at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1327&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴⁹ *France v. Commission*, joined cases C-68/94 and C-30/95, [1998] ECR I-1375, ¶¶ 165-178.

⁵⁰ *Gencor v. Commission*, **Error! Main Document Only**, Case T-102/96, Judgment of the Court of First Instance (Fifth Chamber, Extended Composition), 25 Mar. 1999; [1999] CEC 395, at ¶ 316.

⁵¹ *Supra*, note 24.

⁵² See *AlliedSignal, et al. v. B.F. Goodrich, et al.*, 183 F.2d 568, 575-6 (1999).

B. Confidentiality

In at least one other aspect, judicial review in Europe is notably different than that in the United States: In Europe, pleadings (briefs, etc.) are kept confidential. Thus, unless parties to the appeal issue statements, nothing will be known until the court issues a decision. The confidentiality rules were articulated by the Court of First Instance as follows:⁵³

135. Under the rules which govern procedure in cases before the Court of First Instance, parties are entitled to protection against the misuse of pleadings and evidence. Thus, in accordance with the third subparagraph of Article 5(3) of the Instructions to the Registrar of 3 March 1994 (OJ 1994 L 78, p. 32), no third party, private or public, may have access to the case-file or to the procedural documents without the express authorisation of the President, after the parties have been heard. Moreover, in accordance with Article 116(2) of the Rules of Procedure, the President may exclude secret or confidential documents from those furnished to an intervener in a case.

136. These provisions reflect a general principle in the due administration of justice according to which parties have the right to defend their interests free from all external influences and particularly from influences on the part of members of the public.

C. Standard of Review

The Courts' standard of review accords the Commission some deference in appraising issues that involve economic assessments. This standard is often referred to as the "manifest error" rule. The Courts have stated the standard in merger cases as follows:

[T]he basic provisions of [the Merger] Regulation. . . , in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and, consequently, when the exercise of that discretion, which is essential for defining the rules on concentrations, is under review, the Community judicature must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (*Kali & Salz*, paragraphs 223 and 224, and *Gencor v Commission*, paragraphs 164 and 165). Therefore, it is in the light of the foregoing considerations that it is necessary to examine the merits of the grounds relied on by the applicant to show that the Commission made an error of assessment in finding that the conditions for, or characteristics of, collective dominance would exist were the transaction to be approved.⁵⁴

The CFI restated this language in its judgment, annulling the Commission's decision to prohibit the *Tetra Laval/Sidel* merger.⁵⁵ The Commission appealed this judgment to the ECJ, arguing that "the CFI. . .

⁵³ *Svenska Journalistförbundet v. Council of the European Union*, Case T-174/95, Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 17 June 1998; [1998] ECR II-2289; available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995A0174.

⁵⁴ *Airtours plc v. Commission*, supra, note 30.

⁵⁵ *Tetra Laval BV v. Commission*, supra, note 33.

imposed a disproportionate standard of proof for merger prohibition decisions.”⁵⁶ The ECJ broadly upheld the CFI’s judgment.⁵⁷

D. Efficacy

Despite complaints over the length of time consumed by judicial review,⁵⁸ that has not deterred parties and third parties from challenging Commission decisions. For example, over half of the Commission’s 19 prohibition decisions have been appealed; and, quite a few clearance decisions have been challenged by third parties. Furthermore, appeal of Commission decisions has been made more attractive by the Court’s adoption of expedited (colloquially known as “fast-track”) procedures.⁵⁹ Whereas the CFI took three years to decide the *Airtours* case, both the *Schneider* and *Tetra Laval/Sidel* cases were decided by the CFI under the expedited procedures within eight months. A useful explanation of the expedited procedure may be found in the European Commission’s Competition Policy Newsletter of October 2002.⁶⁰

⁵⁶ Commission appeals CFI ruling on Tetra Laval/Sidel to the European Court of Justice, EC Press Release IP/02/1952, 20 Dec. 2002; available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action=getfile&gf&doc=IP/02/1952/0/RAPID&lg=EN&type=PDF.

⁵⁷ *Commission v. Tetra Laval BV*, *supra*, note 46, ¶¶ 37-50; It is beyond the scope of this paper to delve into the issues raised in this case, including whether the court applies a different standard for vertical and conglomerate mergers than for horizontal mergers. See, e.g., Götz Drauz, Conglomerate and vertical mergers in the light of the Tetra Judgement, EC Competition Policy Newsletter, 2005, Number 2, 35, available at: http://europa.eu.int/comm/competition/publications/cpn/cpn2005_2.pdf.

⁵⁸ See, e.g., John Ratliff, Sven Volcker and Antonio Capobianco of Wilmer, Cutler & Pickering, EC Merger Control 2001/2002: from controversy to change, contained in Global Competition Review Special Report, The European Antitrust Review 2003, 33, 34-35.

⁵⁹ RULES OF PROCEDURE OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES OF 2 MAY 1991, as amended on 6 Dec. 2000, OJ L 322/4, 19 Dec. 2000, Chapter 3a, Article 76a; available at: <http://curia.eu.int/en/instit/txtdocfr/txtsenviguer/txt7.pdf>. See also Notes for the guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities, § 12, available at: <http://curia.eu.int/en/instit/txtdocfr/autrestxts/txt9.pdf>.

⁶⁰ Kyriakos Fountoukakos, Judicial review and merger control: The CFI’s expedited procedure, EC Competition Policy Newsletter, Oct. 2002, 7; available at: http://europa.eu.int/comm/competition/publications/cpn/cpn2002_3.pdf.